

## OFFICE OF ADMINISTRATIVE LAW

Bill Jones  
 SECRETARY OF STATE

In re: )  
 Request for Regulatory )  
 Determination filed by CARL D. )  
 McQUILLION regarding the ) 1999 OAL Determination No. 22  
 "Close Custody Criteria for Male )  
 Inmates" issued by the ) [Docket No. 98-007]  
 DEPARTMENT OF CORRECTIONS )  
 and the "Operations Manual ) October 5, 1999  
 Supplement for Volume VI" of )  
 the Department of Corrections ) Determination Pursuant to  
 Operations Manual and a ) Government Code Section  
 memorandum entitled "Security ) 11340.5; Title 1, California  
 Enhancements," both of which ) Code of Regulations,  
 were issued by the Warden of ) Chapter 1, Article 3  
 CALIFORNIA MEN'S COLONY, SAN )  
 LUIS OBISPO<sup>1</sup> )  
 \_\_\_\_\_ )

Determination by: CHARLENE G. MATHIAS, Deputy Director

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 Regulatory Determinations Program

SYNOPSIS

The Office of Administrative Law concludes that (1) a departmental directive intended to standardize the terms of years that specified inmates are required to serve in certain classifications is a "regulation" that should have been, but was not, adopted pursuant to the APA; (2) a provision of a prison manual is also an invalid "regulation" to the extent it duplicates the invalid statewide directive; but (3) other provisions of the prison manual and a separate memorandum, though constituting "regulations," are not subject to the APA because of a special express APA exception for rules applying solely to one particular prison, if specified statutory conditions are met.

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## DECISION <sup>2,3,4</sup>,

The issue presented to the Office of Administrative Law ("OAL") is whether the following challenged rules are "regulations" required to be adopted pursuant to the Administrative Procedure Act ("APA"):<sup>5</sup>

- (1) The "Close Custody Criteria for Male Inmates" (dated 9/24/97), issued by the Department;<sup>6</sup>
- (2) The California Men's Colony "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual issued by the Warden of the California Men's Colony, San Luis Obispo;<sup>7</sup> and
- (3) The memorandum entitled "Security Enhancements," dated June 2, 1998, issued by the Warden of the California Men's Colony, San Luis Obispo.<sup>8</sup>

OAL has determined that:

- (1) The "Close Custody Criteria for Male Inmates" (dated 9/24/97) contains "regulations" which should have been adopted in accordance with the APA;
- (2) The California Men's Colony "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual issued by the Warden of the California Men's Colony, San Luis Obispo, contains "regulations" which are not subject to the APA because of a special express APA exception for rules applying solely to one particular prison. However, to the extent this document restates provisions contained in challenged rule no. 1, the specified statutory conditions are not met, and the "local rule" exception does not apply; and
- (3) The memorandum entitled "Security Enhancements," dated June 2, 1998, issued by the Warden of the California Men's Colony, San Luis Obispo, contains "regulations" which are not subject to the APA because of a special express APA exception for rules applying solely to one particular prison if specified statutory conditions are met.

## DISCUSSION

Carl D. McQuillion is an inmate at the California Men's Colony, San Luis Obispo. On October 7, 1998, he requested OAL to determine whether the rules identified above are invalid since they were not adopted in compliance with the APA.

### **I. IS THE APA GENERALLY APPLICABLE TO THE QUASI-LEGISLATIVE ENACTMENTS OF THE DEPARTMENT OF CORRECTIONS?**

Penal Code section 5058, subdivision (a), declares in part that:

"The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations *shall be promulgated and filed pursuant to [the APA]. . . .*"  
[Emphasis added.]

Clearly, the APA generally applies to the Department's quasi-legislative enactments. However, effective January 1, 1995,<sup>9</sup> Penal Code section 5058 was amended to include several express exemptions from APA rulemaking requirements in subdivisions (c) and (d). The exemption in subsection (c) will be discussed later.

For many years, the Department of Corrections maintained a "family of manuals," including the Classification Manual. These manuals contained most of the statewide rules governing prison administration. In 1990, these individually titled one-volume manuals were replaced by a nine-volume compendium entitled the "Department of Corrections Operations Manual" (also known as the Department Operations Manual or most commonly by the acronym "DOM"). Rules governing inmate classification are now found in volume VI of DOM.

A number of judicial decisions and OAL determinations have found that various CDC manuals and manual provisions violated the statutory prohibition against agency use of "underground regulations" found in Government Code section 11340.5. In 1982, for example, the California Court of Appeal struck down Forms 839 and 840 (new classification standards), which had been issued as part of an administrative bulletin for inclusion in the Classification Manual.<sup>10</sup> In 1987, OAL

determined that the Classification Manual itself contained regulatory material and thus violated Government Code section 11340.5.<sup>11</sup>

In 1991, the California Court of Appeal ordered the Department to cease enforcement of the regulatory portions of DOM.<sup>12</sup> In this latter case, the Department had conceded that “much” of DOM violated the APA; the court found that “a substantial part” was regulatory (i.e., subject to the APA). Following this 1991 appellate case, the Department began a review of DOM, which though intended to be completed in 1993, is still in progress. Using administrative bulletins, the Department issued lists of DOM sections which were “approved for use” and “not approved for use”<sup>13</sup> within the Department.<sup>14</sup>

Though the Department has since 1991 successfully codified in the California Code of Regulations (“CCR”) a substantial number of DOM’s underground regulations, much remains to be done. From a legal perspective, the validly adopted rules governing the administration of the Department are found in statutes and in the CCR. *However, the Department appears to regard DOM--not the Penal Code or the CCR-- as the primary source of governing rules.* The Department’s response to this request for determination suggests that the Department views DOM provisions that it has “approved for use” as immune from attack on APA grounds. The Department states:

“CDC has reviewed the statewide DOM § 62010 for underground regulations, adopted regulations as necessary, and approved the DOM section for statewide use.”<sup>15</sup>

The Department’s assertion that it has reviewed DOM section 62010 for underground regulations confirms that it has obeyed the order of the appellate court to review DOM material. However, the appellate court did not review the Department’s work and determine that all of the remaining provisions are in compliance with the APA. DOM sections which have been reviewed by the Department and in good faith “approved for use” are not necessarily wholly free of underground regulations. See, e.g., 1998 OAL Determination No. 18 (concluding that the definition of “media representative” in DOM section 13010, which had been “approved for use,” nonetheless violated the APA).<sup>16</sup> *Therefore, the Department’s conclusion that the DOM section is “valid” is of no legal consequence.*<sup>17</sup> If a DOM section, after the Department’s review, is found by the court to contain an underground regulation, then the section violates the APA. If a

DOM section is found by the court to be free of underground regulations, then the section does not violate the APA.

## **II. DO THE CHALLENGED RULES CONSTITUTE “REGULATIONS” WITHIN THE MEANING OF GOVERNMENT CODE SECTION 11342?**

The key provision of Government Code section 11342, subdivision (g), defines “regulation” as:

“... *every* rule, regulation, order, or standard of general application *or* the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by *any* state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . . .” [Emphasis added.]

Government Code section 11340.5, authorizing OAL to determine whether agency rules are “regulations” and thus subject to APA adoption requirements, provides in part:

“(a) *No* state agency shall issue, utilize, enforce, or attempt to enforce *any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘]regulation[‘] as defined in subdivision (g) of Section 11342, *unless* the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].” [Emphasis added.]

In *Grier v. Kizer*,<sup>18</sup> the California Court of Appeal upheld OAL's two-part test<sup>19</sup> as to whether a challenged agency rule is a “regulation” as defined in the key provision of Government Code section 11342, subdivision (g):

First, is the challenged rule either:

- a rule or standard of general application, *or*
- a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either:

- implement, interpret, or make specific the law enforced or administered by the agency, *or*
- govern the agency's procedure?

If an uncodified rule satisfies both parts of the two-part test, OAL must conclude that it is a “regulation” and subject to the APA. In applying the two-part test, OAL is guided by the *Grier* court:

“... because the Legislature adopted the APA to give interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA*. [Emphasis added.]”<sup>20</sup>

Three California Court of Appeal cases provide additional guidance on the proper approach to take when determining whether an agency rule is subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in “a statutory scheme which the Legislature has [already] established. . . .”<sup>21</sup> But “to the extent [that] any of the [agency rules] depart from, or embellish upon, express statutory authorization and language, the [agency] will need to promulgate regulations. . . .”<sup>22</sup>

Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations (“CCR”) provisions) cannot legally be “embellished upon” in administrative bulletins. For example, *Union of American Physicians and Dentists v. Kizer* (1990)<sup>23</sup> held that a terse 24-word definition of “intermediate physician service” in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went “far beyond” the text of the duly adopted regulation.<sup>24</sup> Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* (1993), made clear that reviewing authorities are

to focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

“... the ... Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated ‘regulations’ by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it.* ... [Emphasis added.]”<sup>25</sup>

**A. DO THE CHALLENGED RULES CONSTITUTE “STANDARDS OF GENERAL APPLICATION?”**

For an agency rule or standard to be “of general application” within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.<sup>26</sup>

**Challenged Rule No. 1**

On its face, the “Close Custody Criteria for Male Inmates,” dated 9/24/97, applies to all male inmates in California correctional facilities. This table is attached to this determination as Appendix “A.” In its response, the Department argues that this document (challenged rule no. 1) is “non-mandatory” and that “. . . non-mandatory rules are not ‘regulations’ subject to APA rulemaking requirements. . . .”<sup>27</sup> The Department states:

“Document 1 denominated as ‘Close Custody Criteria For Male Inmates (Dated 9/24/97),’ is being challenged as an ‘underground regulation.’ This document, in the form of a table, sets forth guidelines for custody decisions of inmates with varying histories of crime and escape. Given that it is not signed, and has no express instructions, it is unclear what use facilities are to make of it. Since CDC does not typically issue policies in this rough form, it is likely that Document 1 is a fragment of another document. No context has been presented by Mr. McQuillion that shows Document 1 is a statewide rule.”

“A table substantially similar to Document 1 was part of a more comprehensive document dated August 4, 1997. The August 4, 1997 memorandum was not issued directly to the prisons. In September 18, 1997,

Eddie Myers, in his former capacity as Chief Deputy Director, Field Operations, sent a transmittal memorandum to all Wardens. The September memorandum confirmed that the criteria for assigning close custody was not standardized in policy statewide. It ordered Wardens to review close custody assignments for inmates at their prison, particularly those with an escape history. The September memorandum refers to and incorporates the August memorandum.”

“The September memorandum provides some analysis of the results of audits performed at prisons that identified inmates with escape histories. Of the 4,159 inmates identified with escapes from a secure perimeter, the memorandum reasons that all of these do not merit close custody. A number of penological interests can be looked to in determining which of that group to place in close custody. The memorandum required review and reconsideration of existing local policies, and application of any revised policies that might result to inmates on a case-by-case basis. The guidelines presented in the memorandums and the tables were only provided as non-mandatory examples of how a prison’s own local policy might be revised.”

“Although Document 1 appears on its face that it could be mandatory, it is just a fragment derived from two larger non-mandatory documents. Document 1 republishes portions of the non-mandatory August and September memoranda. Given that the source memoranda are non-mandatory, the derivative--Document 1--must itself be non-mandatory. Since non-mandatory rules are not ‘regulation’ subject to the APA rulemaking requirements, Document 1 is not an underground regulation. Therefore, OAL must not rule Document 1 to be invalid.”<sup>28</sup>

It must be noted initially that the APA does not provide that “. . . non-mandatory rules are not ‘regulations.’” The statutory definition of “regulation” does not restrict the term “regulation” to agency rules that are binding and mandatory.<sup>29</sup> In addition, Government Code section 11340.5, which authorizes OAL to determine whether agency rules are “regulations,” and thus subject to APA adoption requirements, provides in part:

“(a) No state agency shall *issue, utilize, enforce, or attempt to enforce any* guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [‘]regulation[’] as defined in subdivision (g) of Section 11342, unless the guideline,



criterion, bulletin, manual, instruction, order, standard of general application or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. [Emphasis added.]”

This statute prohibits agencies from performing *four* separately listed actions involving usage of an agency rule subject to the APA: (1) issuance, (2) utilization, (3) enforcement, or (4) attempted enforcement.

Apparently anticipating that state agencies would make creative legal arguments in an effort to avoid APA compliance, the statute prohibits not only enforcement, attempted enforcement, and utilization of rules subject to the APA, but also the mere *issuance* of such rules. It is absolutely clear that the Department “issued” the table entitled “Close Custody Criteria for Male Inmates.” It seems clear that section 11340.5 is intended to preclude agencies from evading APA compliance if the regulated party is unable to prove that the agency “enforced” or “attempted to enforce” the rule.

Government Code section 11340.5 undermines the Department’s argument in another way. Section 11340.5 proscribes not only agency rules which the agency overtly labels or treats as binding and mandatory, but also agency rules which are more benignly characterized by the agency--described as no more than a “guideline,” a “criterion,” a “bulletin,” a “manual,” an “instruction,” or a “standard.”

The California Court of Appeal has made it clear that reviewing authorities are to focus on the content of a challenged rule, not the label placed on the rule by the agency.<sup>30</sup> More important than the agency’s characterization of the challenged rule is the nature of the effect and impact of the rule on the public.<sup>31</sup>

The September 18, 1997 memorandum sent by Eddie Myers in his capacity as Chief Deputy Director of Field Operations to all wardens, to which challenged rule no. 1 was attached, states in part:

“This memorandum provides resolution to the Close Custody assignment for inmates with a history of escape from a secure perimeter.”

“The attached memorandum, dated August 4, 1997, provides the approved Close Custody guidelines relating to escape. Other Close Custody concerns were also addressed and may be applied on a case-by-case basis.”

....

“The inmates at your facility which were identified with a history of escape from secure settings should be evaluated on a case-by-case basis based upon these guidelines.”

Although it may have been made clear elsewhere that it was up to each individual warden to adopt rules for his or her particular institution, it is apparent from this language that the close custody guidelines attached to the memorandum were *very strongly recommended* by the Department and were distributed to each warden for this reason. Although, as explained above, being “mandatory” is not a necessary element in the definition of a “regulation,” it would appear that the result of the dissemination of the “approved Close Custody guidelines” by the Department to the wardens was very nearly the same as if these guidelines had been declared mandatory.

Except for those inmates who are designated a special public interest case and a small change for those found guilty of “RVR [Rules Violation Report] division A-1 or A-2”, the close custody guidelines adopted by the Warden of the California Men’s Colony, San Luis Obispo, in the “Operations Manual Supplement for Volume VI” of the Department of Corrections Operations Manual (challenged rule no. 2; attached as Exhibit “B”) are virtually identical to those “non-mandatory” guidelines contained in challenged rule no. 1 (attached as Exhibit “A”). As a result of another request for determination,<sup>32</sup> OAL is also aware that section 62010 of the Los Angeles Operational Supplement to the CDC Operations Manual adopted by the Warden of that facility includes the identical “Close Custody Guidelines for Male Inmates” (challenged rule no. 1) which was distributed by the September 18, 1997 memorandum from Eddie Myers.

Although OAL is not aware of what custody rules other wardens may have adopted for other correctional facilities, it is apparent that the impact of challenged rule no. 1 at two correctional facilities was not unlike that of a directive.<sup>33</sup> It could reasonably be inferred that challenged rule no. 1 was intended to be of general application unless modified or deleted by each individual warden based upon particular conditions at his or her prison. As previously stated, it is the effect of the

challenged rule on the public, rather than the agency's characterization of the rule, which is paramount. As such, the guidelines contained in challenged rule no. 1 are standards of general application as they apply to all members of an open class.

### **Challenged Rules Nos. 2 and 3**

The California Men's Colony "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual (challenged rule no. 2) contains the close custody criteria for inmates at the California Men's Colony, San Luis Obispo. The memorandum of June 2, 1998 entitled "Security Enhancements" issued by the Warden of the California Men's Colony, San Luis Obispo (challenged rule no. 3), contains changes to custody arrangements for inmates at that facility. Both of these documents apply to all prisoners confined in the California Men's Colony, San Luis Obispo. As such, challenged rules nos. 2 and 3 are standards of general application because they apply to all members of an open class.

Having concluded that the challenged rules are standards of general application, OAL must consider whether the challenged rules meet the second prong of the two-part test.

### **B. DO THE CHALLENGED RULES IMPLEMENT, INTERPRET OR MAKE SPECIFIC THE LAW ENFORCED OR ADMINISTERED BY THE DEPARTMENT OR GOVERN THE DEPARTMENT'S PROCEDURE?**

Penal Code section 5054 declares that

"The supervision, management and control of the State prisons, and the *responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein* are vested in the director [of the Department of Corrections] . . . ." [Emphasis added.]

The Department's classification system specifically implements Penal Code section 5068, last amended in 1989, which provides, in part:

"The Director of Corrections shall cause each person who is newly committed to a state prison to be examined and studied. This includes the investigation of all pertinent circumstances of the person's life such as the existence of any strong community and family ties, the

maintenance of which may aid in the person's rehabilitation, and the antecedents of the violation of law because of which he or she has been committed to prison. Any person may be reexamined to determine whether existing orders and dispositions should be modified or continued in force.

"Upon the basis of the examination and study, the Director of Corrections shall classify prisoners and when reasonable, the director shall assign a prisoner to the institution of the appropriate security level and gender population nearest the prisoner's home, unless other classification factors make such a placement unreasonable."

In duly adopted regulations (Title 15, CCR, section 3377.1), the Department has established eight custody designations: Maximum A, Maximum B, Close A, Close B, Medium A, Medium B, Minimum A, and Minimum B.

The "Close Custody Guidelines for Male Inmates" (challenged rule no. 1) is a table containing the minimum time to be served in "Close A" and "Close B" custody for male inmates based upon the offenses committed or sentences received. The California Men's Colony "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual (challenged rule no. 2) is a much more extensive document containing the custody designation criteria, permissible work assignments, visiting and housing for inmates of different custody designations at the California Men's Colony, San Luis Obispo. It also includes a table (attached as Appendix "B") containing the minimum time to be served in "Close B" custody which is very nearly the same as in challenged rule no. 1. The memorandum entitled "Security Enhancements" (challenged rule no. 3) includes restrictions on work program assignments for inmates at the California Men's Colony, San Luis Obispo.

Among the many provisions contained within challenged rule no. 2 is the following restriction on those inmates in "Close B" custody:

"Not eligible for Family Visiting Program."

This provision appears to do nothing more than restate a portion of CCR Title 15, section 3174, subdivision (e), paragraph (2), which, in part, provides:

“Family visits shall not be permitted for inmates who are in any of the following categories: . . . designated Close A or Close B custody;”

In general, if the agency does not add to, interpret, or modify a statute, it may legally inform interested parties in writing of the statute and “its application.” Such an enactment is simply “administrative” in nature, rather than “quasi-judicial” or quasi-legislative.” If, however, the agency makes new law, i.e., supplements or “interprets” a statute or other provision of law, such activity is deemed to be an exercise of quasi-legislative power. If a rule simply applies an *existing* constitutional, statutory or regulatory requirement that has only *one* legally tenable “interpretation,” that rule is not quasi-legislative in nature--no new “law” is created.

For this reason, OAL concludes that, except for restatements of existing law such as the prohibition against family visiting for “Close B” inmates in challenged rule no. 2, the challenged rules implement, interpret, and make specific Penal Code sections 5054 and, in some instances, 5068.<sup>34</sup>

### **III. DO THE CHALLENGED RULES FOUND TO BE “REGULATIONS” FALL WITHIN ANY RECOGNIZED EXEMPTION FROM APA REQUIREMENTS?**

Generally, all “regulations” issued by state agencies are required to be adopted pursuant to the APA, unless expressly exempted by statute.<sup>35</sup> In *United Systems of Arkansas v. Stamison* (1998),<sup>36</sup> the California Court of Appeal rejected an argument by the Director of the Department of General Services that language in the Public Contract Code had the effect of exempting rules governing bid protests from the APA.

According to the *Stamison* Court:

*“When the Legislature has intended to exempt regulations from the APA, it has done so by clear, unequivocal language. (See, e.g., Gov. Code, section 16487 [‘The State Controller may establish procedures for the purpose of carrying out the purposes set forth in Section 16485. These procedures are exempt from the Administrative Procedure Act.’]; Gov. Code, section 18211 [‘Regulations adopted by the State Personnel Board are exempt from the Administrative Procedure Act’]; Labor Code, section 1185 [orders of Industrial Welfare Commission ‘expressly exempted’ from the APA].) [Emphasis added.]”<sup>37</sup>*

Express statutory APA exemptions may be divided into two categories: special and general.<sup>38</sup> *Special* express statutory exemptions typically: (1) apply only to a portion of one agency's "regulations" and (2) are found in that agency's enabling act. *General* express statutory exemptions typically: (1) apply across the board to all state agencies and (2) are found in the APA. An example of a *special* express exemption is Penal Code section 5058, subdivision (d)(1), which exempts pilot programs of the Department of Corrections under specified conditions. An example of an *general* express exemption is Government Code section 11342, subdivision (g), part of which exempts "internal management" regulations of all state agencies from the APA.

**A. DO THE CHALLENGED RULES FALL WITHIN ANY *SPECIAL* EXPRESS APA EXEMPTION?**

Penal Code section 5058, subdivision (c), states, in part, that:

"(c) The following are deemed *not* to be "regulations" as defined in subdivision (b) [now subdivision (g)] of Section 11342 of the Government Code:

"(1) *Rules issued by the director or by the director's designee applying solely to a particular prison or other correctional facility, provided that the following conditions are met:*

"(A) *All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.*"

"(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public. [Emphasis added.]"

This statutory language indicates that the Legislature intends for *local* prison rules to be exempt from APA adoption procedures, provided certain conditions are met. In its response to this request for determination, the Department of Corrections

indicates that it views the California Men's Colony "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual (challenged rule no. 2) and the memorandum entitled "Security Enhancements," dated June 2, 1998, (challenged rule no. 3), both issued by the Warden of the California Men's Colony, San Luis Obispo, as "local rules."<sup>39</sup>

When a challenged rule superficially appears to be a local prison rule, OAL must determine whether it actually qualifies under this statutory APA exception. Whether a state agency rule is subject to the APA does not depend solely on the issuing agency's official designation of the action. According to the California Court of Appeal: "[i]f the action is *not only of local concern, but of statewide importance*, it qualifies as a regulation despite the fact it is called 'resolutions,' 'guidelines,' 'rulings' and the like." (Emphasis added.)<sup>40</sup>

### **Challenged Rule No. 2:**

The minimum terms for close custody specified in the "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual (challenged rule no. 2) were issued by the Warden of the California Men's Colony, San Luis Obispo, but they did not all originate there. The minimum terms are based upon inmate classification. According to DOM section 62010.1 ("Policy"), the goals of the inmate classification system include "provision for *centralized control* over the classification process." [Emphasis added.]

Central control is evidently maintained through directives from headquarters. The memorandum dated September 18, 1997, from Chief Deputy Myers concerning "Close Custody Assignment for Inmates with Escape History," which enclosed the August 4 memo and attachments stated in part that:

"The attached memorandum, date August 4, 1997 *provides the approved Close Custody guidelines* relating to escape . . . ."

"The inmates at your facility which were identified with a history of escape from secure settings should be evaluated on a case-by-case basis *based upon these guidelines* . . . ." (Emphasis added.)

In addition, language included in the August 4, 1997, memorandum from the Deputy Director of the Institutions Division provides as follows:

“Attached are charts that act as a guide for the criteria. This (sic) criteria was developed based on input from a Warden’s Advisory Group on Security in 1996. This proposal seeks to *standardize* the expectations and criteria for assigning Close custody.” [Emphasis added.]

Attached to the “Operations Manual Supplement for Volume VI” issued by the Warden of the California Men’s Colony, San Luis Obispo, (challenged rule no. 2) is a criteria table specifying minimum terms of close custody. This criteria table is attached to this determination as Appendix “B.” With only a few exceptions, the *close custody minimum terms* specified in this criteria table attached to the “Operations Manual Supplement for Volume VI” issued by the Warden of the California Men’s Colony, San Luis Obispo, and challenged by the requester, are the same as the minimum terms issued by or on behalf of the Deputy Director of the Institutions Division, and approved by the Chief Deputy Director of Field Operations and the Interim Director of the Department in challenged rule no. 1 (attached as Appendix “A”). The specific exceptions are:

- the Warden’s rule for those cases designated to be of special public interest provides for the total term to be “Close B” custody unless “PIC [Public Interest Case] status is removed” whereas the Deputy Director’s version (challenged rule no. 1) provides for at least 5 years at “Close B” custody after at least 5 years at “Close A” custody.
- the Warden’s rule for those found guilty of “RVR [Rules Violation Report] division A-1 or A-2” only applies “. . .when it is determined by a classification committee that a pattern of, or continuing propensity for violence, escape, or narcotic trafficking exists.” In challenged rule no. 1, it is an either-or situation.
- the two “BPT [Board of Prison Terms]” entries in the Warden’s criteria table are not contained in challenged rule no. 1.

For these reasons, the criteria table of the “Operations Supplement for Volume VI” (Appendix “B”) does not meet the requirements for an exception from the APA as a “local rule” under section 5058 of the Penal Code. The criteria table for challenged rule no. 2 issued by the Warden of the California Men’s Colony, San Luis Obispo, contains the same minimum terms of close custody (with minor exceptions) as the “Close Custody Guide for Male Inmates” issued by the Department (challenged rule



no. 1; Appendix "A"). DOM indicates that prisoner classification is subject to central control. The August 4, 1997 memorandum, to which challenged rule no. 1 was attached, emphasizes the need for *standardization of expectations and criteria*. In 1999 OAL Determination No. 21, OAL found that, although couched in language that is not necessarily compulsory,<sup>41</sup> the August 4, 1997, memorandum is a standard of general application issued by the Department in its administration of the prisons to guide local prison actions. In this determination, we have likewise determined that the "Close Custody Criteria for Male Inmates" (challenged rule no. 1) which was attached to the August 4, 1997 memorandum is also a standard of general application. To the extent that the California Men's Colony "Operations Manual Supplement for Volume VI" (challenged rule no. 2) repeats in its criteria table the close custody minimum terms specified in challenged rule no. 1, it is merely its reiteration. The APA is not so limited that its reach can be avoided by the simple expedient of directing local prisons to adopt standardized rules.

This is made clear in the text of the statutory "local rule" exception itself. Although section 5058 of the Penal Code provides in subsection (c)(1) that rules adopted by the director or the director's designee applying solely to a particular prison are deemed not to be a "regulation," it does so "provided that the following conditions are met . . . ." The first condition is that:

"All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to [the APA]."

This condition is not met where the rule adopted by the warden for a particular institution reiterates a statewide standard that was not adopted by the Department of Corrections pursuant to the APA. For this reason, to the extent the California Men's Colony "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual (challenged rule no. 2) reiterates the August 4, 1997 memorandum of the Department of Corrections, it is not exempt as a "local rule" pursuant to section 5058 of the Penal Code. In particular, the criteria table attached to challenged rule no. 2 (Appendix "B") is largely a restatement of a statewide rule and is not exempt as a "local rule" except in the few instances where it differs from challenged rule no. 1.

### **Challenged Rule No. 3**

The memorandum entitled "Security Enhancements," dated June 2, 1998, issued by the Warden of the California's Men's Colony, San Luis Obispo, (challenged rule

no. 3) describes changes being made at the California Men's Colony, San Luis Obispo, to increase security as a result of the attempted escape from the East Facility on June 1, 1998. Some of these provisions were later incorporated into the California Men's Colony "Operations Manual Supplement for Volume VI" to the Department of Corrections Operations Manual (dated 8/24/98) issued by the Warden of the California Men's Colony, San Luis Obispo. This appears to be a genuine local rule; however, it is of course possible that it is a restatement of a centrally issued standard. If this were the case, then the informally issued headquarters rule requiring the promulgation of local prison rules would be a "regulation" which should be adopted in accordance with the APA. In any event, we have no evidence to indicate that challenged rule no. 3 is anything other than a local rule. As such, OAL must conclude it is exempt from the requirements of the APA.

### **Final Note**

In his request for determination, Mr. McQuillion also asserts that:

"The challenged amendments are invalid as a claim of security necessity for failure of the agency to provide the required substantial evidence to support their claim;

The challenged amendments are invalid in that they set forth criteria that is completely arbitrary;

The challenged amendments, per se and as applied, constitute an exaggerated and unreasonable response to an unsupported claim of security necessity; and

The application of the challenged amendments constitute mass punishment of inmates in violation of substantive due process without substantial evidence of compelling penological necessity."<sup>42</sup>

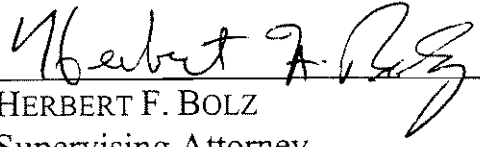
OAL's authority here does not extend to determining whether the challenged rules are supported by substantial evidence, are reasonable, or are in violation of due process. OAL's authority is limited to determining whether an uncodified state agency rule has been issued in violation of Government Code section 11340.5. However, in the event regulations are proposed by the Department under the APA, OAL will review the *proposed* regulations for compliance with six statutory criteria. (Government Code sections 11349 & 11349.1.) Two of these criteria are "necessity" and "consistency." In conducting the review, OAL will consider all comments submitted to the adopting agency during the public comment period.

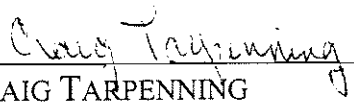
## CONCLUSION

For the reasons set forth, OAL finds that:

- (1) The "Close Custody Criteria for Inmates," dated 9/24/97, (challenged rule no. 1) is a "regulation" which should have been adopted in accordance with the APA.
- (2) The California Men's Colony "Operations Manual Supplement for Volume VI" of the Department of Corrections Operations Manual issued by the Warden of the California Men's Colony, San Luis Obispo, (challenged rule no. 2) contains "regulations" which are not subject to the APA because of a special express APA exception for rules applying solely to the particular prison, if specified statutory conditions are met. However, to the extent the criteria table attached to challenged rule no. 2 restates provisions contained in challenged rule no. 1, the statutory conditions are not met and the "local rule" exception does not apply.<sup>43</sup>
- (3) The memorandum entitled "Security Enhancements," dated June 2, 1998, issued by the Warden of the California Men's Colony, San Luis Obispo, contains "regulations" which are not subject to the APA because of a special express APA exception for rules applying solely to one particular prison if specified statutory conditions are met.<sup>44</sup>

DATE: October 5, 1999

  
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## ENDNOTES

1. This Request for Determination was filed by Carl D. McQuillion, B-54054, California Men's Colony - East, P.O. Box 8101-3306 X, San Luis Obispo, CA 93409-8101. The agency's response was submitted by Meg Halloran, Deputy Director (A) of the Legal Affairs Division, Department of Corrections, 1515 S Street, North Building, P.O. Box 942883, Sacramento, CA 94283-0001. (916) 327-5306.
2. This determination may be cited as **"1999 OAL Determination No. 22."**

Pursuant to Title 1, CCR, section 127, this determination becomes effective on the 30th day after filing with the Secretary of State, which filing occurred on the date shown on the first page of this determination.

Government Code section 11340.5, subdivision (d), provides that:

"Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published [in the California Regulatory Notice Register]."

Determinations are ordinarily published in the Notice Register within two weeks of the date of filing with the Secretary of State.

3. If an unmodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) An agency rule found to violate the APA could also simply be rescinded.
4. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121 (a), provides:

"*Determination*" means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is *invalid and unenforceable* unless

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA.  
[Emphasis added.]”

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that unmodified agency rule which constituted a “regulation” under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was “*invalid*”). We note that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577, 59 Cal.Rptr. 2d 186, 198. *Grier*, however, is still authoritative, except as specified by the *Tidewater* court. *Tidewater* itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

5. According to Government Code section 11370:

“Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370), Chapter 4.5 (commencing with Section 11400), and Chapter 5 (commencing with Section 11500) constitute, and may be cited as, the *Administrative Procedure Act*.” [Emphasis added.]

*OAL refers to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 (“Administrative Regulations and Rulemaking”) of Division 3 of Title 2 of the Government Code, sections 11340 through 11359.*

6. Request for Determination, Exhibit A.
7. Request for Determination, Exhibit C.
8. Request for Determination, Exhibit B.
9. For a detailed description of the APA and the Department of Corrections' history, three-tier regulatory scheme, and the line of demarcation between (1) statewide and (2) institutional, e.g., “local rules,” see **1992 OAL Determination No. 2** (Department of Corrections, March 2, 1992, Docket No. 90-011), California Regulatory Notice Register 92, No. 13-Z, March 27, 1992, p. 40.
10. *Stoneham v. Rushen* (1982) 137 Cal.App.3d 729, 188 Cal.Rptr.130.
11. **1987 OAL Determination No. 3**, CRNR 87, No. 12-Z, March 20, 1987, p. B-74.

12. *Tooma v. Rowland* (Sep. 9. 1991) California Court of Appeal, Fifth Appellate District, FO15383 (granting writ of mandate ordering Director of Corrections “to cease enforcement of those portions of the Department Operations Manual that require compliance with the Administrative Procedure Act pending proof of satisfactory compliance with the provisions of the Act,” typed opinion, pp. 3-4).
13. As noted in 1998 OAL Determination No. 13, endnote 23 (CRNR 98, No. 34-Z, August 21, 1998, p. 1619), the Department has taken the unusual approach of leaving in print, in DOM, provisions which it has concluded contain underground regulations (i.e., material issued in violation of Government Code section 11340.5). Instead of simply deleting the illegal material from DOM, the Department has designated the material as “not to be used.” This has not cured the APA problems. In 1998 OAL Determination No. 13, OAL concluded that DOM section 54020.9 (concerning unclothed body searches of visitors, searches of minors, and the circumstances under which they shall be conducted) does indeed violate the APA. OAL reached this conclusion even though this DOM section had been listed by the Department under the “not to be used” heading.
14. Administrative Bulletin 97/8, like earlier bulletins, states:

“Also listed are the DOM sections which are not approved for use within the CDC under the Administrative Procedure Act. Each CDC office, institution, and parole region shall place the following disclaimer in front of each nonapproved DOM section. ‘This section is not currently approved for use. Refer to the following local procedure(s).’ If no local procedures exist then omit the reference to local procedures. Each institution and parole region shall *independently* implement local procedures in accordance with all applicable laws and regulations to govern those policies and procedures which are not covered by an approved DOM section.” [Emphasis added.]
15. Agency response, p. 5.
16. CRNR 98, No. 36-Z, September 4, 1998, p. 1763.
17. According to *Engelmann v. State Board of Education* (1991), a state agency’s “administrative interpretation” that the APA does not apply to a particular enactment of that agency should be accorded “no significance.” 2 Cal.App.4th 47 \_\_\_, 3 Cal.Rptr. 264, 272. By contrast, OAL’s views concerning whether or not the APA applies to a particular agency enactment are entitled to “great weight.” *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244.
18. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251. OAL notes that a 1996 California Supreme Court case stated that it “disapproved” of *Grier* in part. *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 577. *Grier*, however, is still good law, except as specified by the *Tidewater* court. Courts may cite cases which have been disapproved on other grounds. For instance, in *Doe v. Wilson* (1997) 57 Cal.App.4th 296, 67 Cal.Rptr.2d 187, 197, the California Court of Appeal, First District, Division 5

cited *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596, on one point, even though *Poschman* had been expressly disapproved on another point nineteen years earlier by the California Supreme Court in *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204 n. 3, 149 Cal.Rptr. 1, 3 n. 3. Similarly, in *Economic Empowerment Foundation v. Quackenbush* (1997) 57 Cal.App.4th 677, 67 Cal.Rptr.2d 323, 332, the California Court of Appeal, First District, Division 4, nine months after *Tidewater*, cited *Grier v. Kizer* as a distinguishable case on the issue of the futility exception to the exhaustion of administrative remedies requirement.

*Tidewater* itself, in discussing which agency rules are subject to the APA, referred to “the two-part test of the Office of Administrative Law,” citing *Union of American Physicians & Dentists v. Kizer* (1990) 223 Cal.App.3d 490, 497, 272 Cal.Rptr. 886, a case which quotes the test from *Grier v. Kizer*.

19. The *Grier* Court stated:

“The OAL’s analysis set forth a two-part test: ‘First, is the informal rule either a rule or standard of general application or a modification or supplement to such a rule? [Para.] Second, does the informal rule either implement, interpret, or make specific the law enforced by the agency or govern the agency’s procedure?’ (1987 OAL Determination No. 10, . . . slip op’n., at p. 8.) [*Grier*, disapproved on other grounds in *Tidewater*].”

OAL’s wording of the two-part test, drawn from Government Code section 11342, has been modified slightly over the years. The cited OAL opinion--**1987 OAL Determination No. 10**--was published in California Regulatory Notice Register 96, No. 8-Z, February 23, 1996, p. 292.

20. (1990) 219 Cal.App.3d 422, 438, 268 Cal.Rptr. 244, 253. The same point is made in *United Systems of Arkansas v. Stamison* (1998) 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 412, review denied.
21. 2 Cal.App.4th 47, 62, 3 Cal.Rptr.2d 264, 275, review denied.
22. *Id.*
23. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
24. *Id.*
25. (1993) 12 Cal.App.4th 697, 702, 16 Cal.Rptr.2d 25, 28.
26. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).

27. Agency response, p. 3.
28. Agency response, p. 3.
29. Government Code section 11342, subdivision (g); **1999 OAL Determination No. 17**, CRNR 99, No. 33-Z, August 13, 1999, p. 1575.
30. *State Water Resources Control Board v. Office of Administrative Law* (Bay Planning Commission) (1993) 12 Cal.App. 4th 697, 702, 16 Cal.Rptr.2d 25, 28.
31. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
32. 1999 OAL Determination No. 21.
33. See also the letter dated September 3, 1998 from Gwynnae L. Byrd, Principal Consultant, Joint Committee on Prison Construction and Operations, to Carl D. McQuillion attached to this request for determination which stated in part:

“I have received your letter regarding the reclassification of inmates to Close B status. This has been happening at all institutions statewide, not just at the California Men’s Colony-East.”
34. OAL does not review alleged underground regulations for compliance with the APA's six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. However, in the event regulations are proposed by the Department under the APA, OAL will review the *proposed* regulations for compliance with the six statutory criteria. (Government Code sections 11349 & 11349.1.)
35. Government Code section 11346.
36. 63 Cal.App.4th 1001, 1010, 74 Cal.Rptr.2d 407, 411-12, review denied.
37. 63 Cal.App.4th at 1010, 74 Cal.Rptr.2d at 411.
38. Cf. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126, 174 Cal.Rptr. 744, 747 (exemptions found either in prevailing wage statute or in the APA itself).
39. Agency response, pp. 4 and 5.
40. *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 128, 174 Cal.Rptr. 744, 747.
41. See 1999 OAL determination No. 17, pp. 11-12 and endnotes 38 through 41. (CRNR 99, No. 33-Z. August 13, p. 1575, at p. 1083.)



42. Request for Determination, pp. 5 and 6.
43. If challenged rule no. 2 contains other restatements of a centrally issued standard which has not been adopted pursuant to the APA, the "local rule" exception does not apply to those restatements.
44. If challenged rule no. 3 contains restatements of a centrally issued standard which has not been adopted pursuant to the APA, the "local rule" exception does not apply to those restatements.

# **CLOSE CUSTODY GUIDE FOR MALE INMATES**

LENGTH OF SENTENCE		CLOSE A CUSTODY		CLOSE B CUSTODY	
	Life without Possibility of Parole (LWOP)		First 5 years		Next 10 years after at least 5 years at Close A
	Determinate Sentence (DSL) or Total Term of 50 years or more		First 5 years		Next 10 years after at least 5 years at Close A
	Multiple Life Terms		First 5 years		Until within 7 years to Minimum Eligible Parole Date (MEPD) after at least 5 years at Close A
	Life Term		First year		Until within 7 years to MEPD after at least first year at Close A
	Determinate Sentence or Total Term of 15 years or more		First year		Next 4 years after at least first year at Close A
	Escape w/Force or Attempted Escape w/Force from any correctional setting or armed escort within 5 years of return to custody		First 8 years		Next 2 years after at least 8 years at Close A
ESCAPE	Escape w/o Force or Attempted Escape w/o Force from a secure perimeter facility or armed escort within 5 years of return to custody		First 5 years		Next 5 years after at least 5 years at Close A
	Involvement in documented plot or plan to escape from a secure perimeter facility within 2 years		First 2 years		Next 2 years after at least 2 years at Close A
	Active law enforcement HOLD for an offense which could result in sentencing as an LWOP, to Multiple LIFE Terms, or to a DSL/Total Term of 50 years or more		Until HOLD is removed or 5 years based on potential Total Term		Until HOLD is removed after at least 5 years at Close A
HOLD	Active law enforcement hold for an offense which could result in sentencing to a Total Term of LIFE or to a DSL/Total Term of 15 years or more		Until HOLD is removed or one year based on potential Total Term		Until HOLD is removed after at least one year at Close A
	Murder of Non-Inmate while in custody		Total Term after SHU		Not eligible
DISCIPLINARY HISTORY	Murder of inmate in custody within last 6 years		First 6 years after SHU		Next 4 years after at least 6 years at Close A
	Found guilty of RVR division A-1 or A-2 or who is determined by classification committee to demonstrate a pattern of or a continuing propensity for violence, escape or narcotic trafficking				Two years before eligible for custody reduction
	Former gang member (Dropout) for a period of observation				One year before eligible for custody reduction
NOTORIETY	Designated Special Public Interest Case		First 5 years		Next 5 years after at least 5 years at Close A

